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No. 07-9712

In the Supreme Court of the United States

JAMES BENJAMIN PUCKETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

GREGORY G. GARRE
Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LISA H. SCHERTLER
Assistant to the Solicitor General
KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a forfeited claim that the government breached a plea agreement is subject to the plain-error standard of Rule 52(b) of the Federal Rules of Criminal Procedure.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 505 F.3d 377.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2007. A petition for rehearing was denied on December 4, 2007 (Pet. App. 2). The petition for a writ of certiorari was filed on March 3, 2008, and was granted on October 1, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

The relevant provisions of the Federal Rules of Criminal Procedure are reprinted in an appendix (App., *infra*, 1a-7a) to this brief.

STATEMENT

Following a guilty plea entered pursuant to a written agreement with the government, petitioner was convicted in the United States District Court for the Northern District of Texas of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). J.A. 49a-50a, 62a, 65a. Petitioner was sentenced to consecutive terms of 262 months of imprisonment on the bank robbery count and 84 months of imprisonment on the firearm count, to be followed by three years of supervised release. Pet. App. 1, at 2; J.A. 35a. On appeal, petitioner asserted for the first time that the government had breached the plea agreement at sentencing. Pet. App. 1, at 3. The court of appeals applied the plain-error standard of Rule 52(b) of the Federal Rules of Criminal Procedure to petitioner's forfeited claim and affirmed. *Id.* at 3-5.

1. On April 4, 2002, petitioner entered Guaranty Bank in Dallas, Texas, approached two tellers, and placed a handwritten note on the counter. The note stated that petitioner was robbing the bank and instructed the tellers not to trigger an alarm or give petitioner trackers or dye packs. One of the tellers moved to assist her colleague, and petitioner pointed a chrome handgun at the moving teller. The second teller handed petitioner $4275 in currency. Petitioner took the money and left the bank. J.A. 72a.

On April 8, 2002, petitioner was arrested in Nevada on a supervised release violator's warrant. After his arrest, petitioner admitted that he had robbed the Guaranty Bank four days earlier using a chrome .22-caliber revolver. J.A. 138a.

2. In July 2002, a grand jury in the Northern District of Texas returned a two-count indictment charging petitioner with armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). J.A. 49a-50a. Petitioner was appointed counsel and pleaded not guilty. J.A. 8a.

3. On September 3, 2003, the parties filed a written plea agreement in the district court. J.A. 14a, 51a-56a. The agreement provided that petitioner would enter guilty pleas to both counts of the indictment. J.A. 52a. The agreement also enumerated the trial rights that petitioner would waive by pleading guilty. J.A. 51a-52a. The agreement specified the maximum penalties that were authorized by the applicable criminal statutes and provided that petitioner would not be permitted to withdraw his plea if the applicable sentencing range under the Sentencing Guidelines was higher than he expected or if the district court departed from the applicable range. J.A. 52a-53a.

The plea agreement provided that the "government agrees that [petitioner] has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level." J.A. 54a; see Sentencing Guidelines § 3E1.1(a) and (b).[1] The government also

[1] Section 3E1.1(a) of the Sentencing Guidelines authorizes a two-level reduction in offense level if a defendant "clearly demonstrates acceptance of responsibility for his offense." Sentencing Guidelines § 3E1.1(a). Section 3E1.1(b) authorizes a further one-level reduction, on motion of the government, for a defendant whose offense level is 16 or greater and who has "assisted authorities in the investigation or prosecution of his own misconduct" by timely providing information to the authorities or timely notifying authorities of his intention to enter a guilty plea. *Id.* § 3E1.1(b).

"agree[d] to request that [petitioner's] sentence be placed at the lowest end of the guideline level deemed applicable by" the district court. J.A. 54a.

4. On September 4, 2003, the government filed a motion requesting that petitioner's offense level be decreased by a third level for acceptance of responsibility under Section 3E1.1(b) of the Sentencing Guidelines. J.A. 57a-59a. The government "reserved[d] the right to withdraw" its request if petitioner engaged in conduct inconsistent with his acceptance of responsibility. J.A. 58a. No equivalent term appeared in the plea agreement, however. See J.A. 51a-56a.

5. On September 18, 2003, petitioner entered a guilty plea pursuant to the plea agreement. J.A. 60a-74a. At the plea proceeding, the district court informed the parties that it possessed a copy of the plea agreement, which had been signed by the prosecutor, petitioner, and his attorney. J.A. 65a. Petitioner and his counsel confirmed that they had signed the agreement and approved of its contents. J.A. 66a.[2] At the court's request, the prosecutor orally summarized all the terms of the plea agreement, J.A. 67a-69a, including the government's "agree[ment] that [petitioner] has demonstrated acceptance of responsibility and thereby would qualify for a three level reduction in his offense level," J.A. 68a. Petitioner and his counsel each orally affirmed that the prosecutor's summary of the plea agreement was correct. J.A. 69a. The district court then reviewed several terms of the agreement again and confirmed that peti-

[2] Petitioner clarified with the district court that the plea agreement would permit him to "possibly appeal [based on] ineffective assistance of [his] previous counsel." J.A. 66a. Petitioner had no other questions about the plea agreement and asked the court to accept the agreement. J.A. 66a-67a.

tioner and his counsel had discussed those terms. J.A. 69a-71a. Petitioner orally affirmed that he wanted the court to accept the plea agreement. J.A. 71a.

The district court also possessed a copy of the factual resume that had been filed with the plea agreement. J.A. 71a. The court noted that the factual resume identified the elements of both offenses with which petitioner was charged. *Ibid.* At the court's request, the prosecutor recited the factual statement. J.A. 71a-72a. Petitioner confirmed that he had signed the factual statement and that it was accurate. J.A. 73a. The district court accepted petitioner's guilty plea after finding that petitioner was entering the plea intelligently and voluntarily and that the stipulated facts supported the plea. *Ibid.*

6. a. On October 30, 2003, an initial presentence report (PSR) was filed. J.A. 129a-192a. The PSR recited all of the terms of petitioner's plea agreement, J.A. 134a-135a, including the government's "agree[ment] that [petitioner] has demonstrated acceptance of responsibility and qualifies for a 3 level reduction in his offense level," J.A. 135a. The PSR also summarized the government's written motion supporting petitioner's qualification for a third offense-level reduction under Sentencing Guidelines § 3E1.1(b). J.A. 140a. The PSR noted that at sentencing, "the government will formally move the Court to grant the additional 1 level reduction." J.A. 140a-141a.

The PSR calculated petitioner's base offense level as 20 and his total offense level as 31. J.A. 142a-143a. The total offense level included a two-level increase under Sentencing Guidelines § 2B3.1(b)(1) based on petitioner's robbery of a financial institution. J.A. 142a. The offense level was further increased because peti-

tioner qualified as a career offender under Sentencing Guidelines § 4B1.1.[3] J.A. 143a. The PSR recommended that petitioner receive a three-level downward adjustment in his offense level under Sentencing Guidelines § 3E1.1 because he had "clearly demonstrated acceptance of responsibility for his offense." J.A. 143a. The PSR calculated petitioner's criminal history category as VI; petitioner received additional criminal history points because he had committed his new offenses while on supervised release and parole in certain cases, and within two years of his completion of sentences in other cases. J.A. 168a-169a; see Sentencing Guidelines § 4A1.1(d) and (e). Petitioner's Sentencing Guidelines range of imprisonment on Count 1, as calculated in the PSR, was 188 to 235 months. J.A. 186a. On Count 2, petitioner faced a mandatory consecutive term of at least seven years. *Ibid.*; see 18 U.S.C. 924(c)(1)(A)(ii) and (D)(ii).

b. Petitioner's sentencing was scheduled for December 18, 2003. J.A. 17a. In November 2003, however, petitioner experienced a seizure while in prison and was diagnosed with a brain tumor. J.A. 86a. The tumor was surgically removed in December 2003. J.A. 87a, 202a. Petitioner's sentencing was postponed numerous times over more than two years. J.A. 17a-24a, 29a-30a. The district court granted defense requests to have physical and neurological evaluations performed on petitioner to assess his past and present mental capacity. Pet. App. 1, at 1; J.A. 19a.

c. On September 27, 2005, two years after entering his guilty plea, petitioner filed a pro se pleading assert-

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[3] Petitioner had 23 prior convictions, including felony convictions for forgery, drug possession, theft, and armed robbery. J.A. 144a-168a.

ing that his counsel had rendered ineffective assistance by failing to pursue a diminished-capacity or mental-defect defense. Pet. App. 1, at 1; J.A. 27a. On November 8, 2005, petitioner filed a pro se motion to withdraw his guilty plea alleging, among other things, that his brain tumor and a "bi-polar disorder" had rendered him incompetent to plead guilty. Pet. App. 1, at 1; J.A. 27a-28a. On March 20, 2006, the district court denied both motions. Pet. App. 1, at 1; J.A. 29a. The court noted that petitioner had never been diagnosed with bipolar disorder and that the court-ordered evaluations had revealed no evidence that petitioner was incompetent; the reports instead were "'replete' with findings of rationality." Pet. App. 1, at 1.

d. Because of the lengthy delay in petitioner's sentencing, the district court ordered an updated PSR. J.A. 29a. The probation officer had received information that in February 2005, while in custody pending sentencing in this case, petitioner had assisted Lyndon Drew Hames in a scheme to defraud the United States Postal Service. J.A. 199a. Hames had pleaded guilty in federal court in May 2005 to possession of stolen property of the United States of a value over $1000, in violation of 18 U.S.C. 641. J.A. 199a. The factual statement supporting his plea indicated that petitioner had "suggested" that Hames participate in the fraudulent scheme and had "sent Mr. Hames detailed written instructions on how to execute the scheme." *Ibid.* On March 31, 2006, the probation officer questioned petitioner in the presence of his attorney about his involvement with Hames. *Ibid.* Petitioner admitted to the probation officer that he told Hames of the scheme to defraud and had profited $300 from Hames's crime. *Ibid.*

On April 6, 2006, the probation officer completed a supplemental addendum to the PSR. J.A. 198a-203a. The supplemental addendum reported petitioner's post-plea criminal conduct and recommended that, as a result of that misconduct, petitioner receive no reduction in his offense level for acceptance of responsibility. J.A. 199a-200a. The probation officer recalculated petitioner's total offense level as 34. J.A. 200a. The Sentencing Guidelines range of imprisonment on Count 1, as recalculated in the amended PSR, was 262 to 300 months. *Ibid.*

e. Sentencing occurred on May 4, 2006. J.A. 75a-128a. The prosecutor, the defense attorney, and the district court judge were the same individuals who had participated in the plea proceeding 30 months earlier. J.A. 60a-61a, 75a-76a. Petitioner's counsel objected to the amended PSR's recommendation that petitioner be denied credit for acceptance of responsibility and noted that the government had "filed a motion to allow [petitioner] to have acceptance of responsibility" and that petitioner "did previously accept responsibility by entering a plea of guilty." J.A. 79a. The court indicated that it "want[ed] to hear from the government" and the probation officer on that issue. *Ibid.* The prosecutor responded that her motion for a third level of credit for acceptance of responsibility "was made a long time ago" and predated the new offense that petitioner had committed, according to the amended PSR. *Ibid.* The prosecutor "object[ed] to [petitioner] receiving any acceptance of responsibility levels at this point." *Ibid.* The court then asked whether the probation officer "ha[d] any comment on that." *Ibid.* The probation officer responded that the Sentencing Guidelines "prohibit[ed] any acceptance of responsibility" in light of petitioner's

new offense. J.A. 80a. Defense counsel interjected and asserted that petitioner's new offense had not been proved beyond a reasonable doubt and that, notwithstanding the new offense, the court retained discretion under the Sentencing Guidelines to award credit for acceptance of responsibility. *Ibid.*[4] Petitioner's counsel did not direct the court to paragraph 8 of the plea agreement or assert that the government's position at sentencing was a breach of the agreement. See *ibid.*

Responding to the arguments defense counsel *did* raise, the court "accept[ed] what [counsel] sa[id]" about the discretionary nature of the court's decision but observed that it was "so rare [as] to be unknown around here" that three points of acceptance-of-responsibility credit would be awarded to a defendant who has "committed a crime subsequent to the crime for which they appear before the court." J.A. 80a-81a. The court indicated "[t]entatively" that it would not award petitioner credit for acceptance of responsibility. J.A. 81a. Alluding to the plea agreement, the court added that it believed it had "a recommendation in here somewhere" that the court sentence petitioner "to the lower end of the guidelines." *Ibid.*[5] Defense counsel confirmed that the court was "correct," and the court indicated that it "intend[ed] to follow that" recommendation. *Ibid.*

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[4] The application note to Sentencing Guidelines § 3E1.1 provides that a defendant's "voluntary termination or withdrawal from criminal conduct or associations" is one of a non-exhaustive list of factors that a district court may appropriately consider in deciding whether to award credit for acceptance of responsibility. Sentencing Guidelines § 3E1.1, comment. (n.1(b)).

[5] The government's agreement to recommend that petitioner be sentenced at the low end of the applicable Sentencing Guidelines range appeared in paragraph 9 of the plea agreement. J.A. 54a.

At the conclusion of the sentencing hearing, the district court denied petitioner's request for an acceptance-of-responsibility adjustment "under the circumstances here." J.A. 111a. The court accepted the Sentencing Guidelines range calculated in the amended PSR and sentenced petitioner to the low end of that range—262 months of imprisonment on the bank robbery count and a consecutive term of 84 months of imprisonment on the firearm count, to be followed by three years of supervised release. J.A. 111a, 117a, 119a. The court also ordered petitioner to pay $4275 in restitution to Guaranty Bank. J.A. 117a.

7. The court of appeals affirmed. Pet. App. 1. Among other things, the court rejected petitioner's claim that his "plea agreement [was] invalid because the government breached it." *Id.* at 3. The court noted that the government had "concede[d] that it breached the plea agreement at sentencing by opposing any reduction for acceptance of responsibility." *Ibid.* The court further observed that the parties agreed that petitioner had "forfeited this error" and that "some sort of plain error analysis [was] appropriate." *Ibid.* The court explained that petitioner had proposed "a rule of *per se* reversal any time the government breaches a plea agreement" and that the government "argue[d] that reversal is appropriate only if [petitioner] can make the necessary showing of prejudice." *Ibid.* The court agreed with the government and held that petitioner "must establish the elements of plain error and show prejudice before this court can correct a forfeited error." *Ibid.* (citing *United States* v. *Calverley*, 37 F.3d 160, 162-164 (5th Cir. 1994) (en banc), cert. denied, 513 U.S. 1196 (1995)).

The court noted that some of its cases (such as *United States* v. *Goldfaden*, 959 F.2d 1324 (5th Cir.

1992)), had "ostensibly" reviewed forfeited plea-breach claims for plain error but then had reversed convictions without applying the four components of plain-error review articulated by this Court in *United States* v. *Olano*, 507 U.S. 725 (1993), and applied by the Fifth Circuit in *Calverley*. Pet. App. 1, at 4. The court further noted that other Fifth Circuit cases (such as *United States* v. *Munoz*, 408 F.3d 222 (5th Cir. 2005)), "call[ed] for *per se* reversal any time the government breaches a plea agreement." Pet. App. 1, at 4. In both instances, the court explained, its precedents "did not consider the appellate court's limited authority to review forfeited error." *Ibid.*

Applying the plain-error standard to the facts of this case, the court of appeals determined, first, that "[t]here was error, as the government concede[d] that its objection at sentencing to the reduction for acceptance of responsibility 'contradicted the terms of the plea agreement.'" Pet. App. 1, at 5. The court also determined that "the error was obvious." *Ibid.* But as to "whether th[e] error affected a substantial right," the court held that petitioner had "not carried his burden of showing prejudice." *Ibid.* (citing *United States* v. *Cerverizzo*, 74 F.3d 629, 633 (5th Cir. 1996)). The court found it to be "clear that the [district] court denied [petitioner] a reduction because he admitted he committed another crime while in custody." *Ibid.* The court concluded that petitioner "ha[d] made no showing that, absent the government's recommendation, the district court would have disregarded his criminal conduct and granted the reduction for acceptance of responsibility." *Ibid.* In fact, the court observed, "[t]he record indicates exactly the opposite." *Ibid.* Accordingly, the court held that

petitioner failed to "establish plain error and [was] not entitled to relief on a forfeited objection." *Ibid.*

SUMMARY OF ARGUMENT

The plain-error standard of Rule 52(b) applies to forfeited claims of error raised on direct appeal in federal criminal cases. Because petitioner raised his plea-breach claim for the first time on appeal, Rule 52(b) governs this case. Petitioner cannot show, as he must to warrant relief under Rule 52(b), that the government's breach of the plea agreement at sentencing affected the outcome of the district court proceeding or seriously affected the fairness, integrity, or public reputation of judicial proceedings. The judgment of the court of appeals therefore should be affirmed.

I. It is a fundamental principle of appellate review that a claim of error can be forfeited if it is not raised in the district court. A defendant who fails to object at sentencing may still obtain relief on appeal, but he must establish that reversible plain error was committed. Under Rule 52(b), the party who raises a forfeited claim of error on appeal must demonstrate that an error occurred, that it was plain, and that it affected the party's substantial rights. If those requirements are satisfied, the court of appeals should not exercise discretion to correct the forfeited error unless the claimant also demonstrates that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The plain-error standard of Rule 52(b) applies to a forfeited claim that the government breached a plea agreement. The district court is well-situated to address a claim that a plea agreement has been breached because it presides over the guilty plea proceeding and because Rule 11 requires the district court to review and

approve the terms of any plea agreement. Raising a claim of a breach in the district court permits the court most familiar with the facts to investigate the claim and enforce the agreement if necessary, or grant alternative relief such as permitting a defendant to withdraw his plea. Those measures can obviate the need for appellate review.

If plea-breach claims were not subject to the plain-error standard, distorted incentives and gamesmanship would result. A defendant displeased with the sentence he received could then seek relief, including withdrawal of the guilty plea, in the appellate court without facing the heightened requirements of plain-error review. That would eliminate the incentive for a defendant to move to withdraw his guilty plea in the district court before sentencing (reflected in Rule 11(d) and (e)) based on an alleged government breach of the plea agreement.

II. Petitioner is incorrect that any deviation by the government from the terms of a plea agreement "necessarily vitiates" the voluntariness of the guilty plea and is inherently prejudicial. In many cases, a government breach will not prejudice the defendant, as when the government fails to fulfill a promise to recommend sentencing leniency but the defendant receives that leniency nonetheless. The same is true when the government breaches its agreement by standing silent, but even a favorable word from the government would not have made a difference. In such circumstances, a government breach cannot fairly be characterized as depriving the defendant of awareness and understanding of the consequences of his plea in violation of due process.

Contrary to petitioner's contentions, this Court's cases establish that plain-error principles apply to de-

faulted claims that relate to the validity of a defendant's waiver of trial rights. And not every breach of a plea necessarily satisfies the requirements for reversible plain error.

Whether a breached plea agreement affects substantial rights will depend on whether the error affected the outcome of the district court proceeding. In cases involving a government breach of a plea agreement at sentencing, that inquiry must focus on whether the breach affected the sentence that was imposed. Nothing in *Santobello* v. *New York*, 404 U.S. 257 (1971), is to the contrary. *Santobello* arose out of state court proceedings and involved a preserved objection to a government breach of a plea agreement at sentencing, as well as other errors. In ordering relief in that case, the Court did not address whether the federal plain-error standard would apply if the claim instead had been forfeited.

Even assuming that a government breach necessarily affects a defendant's substantial rights in the plea process, the discretionary component of the plain-error standard should preclude reversal if the breach of a sentencing promise did not adversely affect the outcome of the proceedings, *i.e.*, the defendant's sentence. A regime that would permit a defendant to withhold an objection in the district court and then earn reversal on appeal for a non-prejudicial error would cause disrepute for the judicial process and undermine the important interest in the finality of guilty pleas.

III. The government's breach of the plea agreement in this case was not reversible plain error. The government's breach had no effect on the outcome. Before his sentencing, petitioner engaged in new criminal conduct. Criminal conduct is antithetical to acceptance of responsibility, and the district court's remarks at sentencing

made clear that it found that fact controlling. Petitioner therefore cannot carry his burden of demonstrating that the government's failure to support petitioner's request for acceptance-of-responsibility credit affected his substantial rights, *i.e.*, the sentence he received.

Even if one were to accept petitioner's view that substantial rights are always affected when the government breaches a plea agreement, petitioner cannot demonstrate that the government's breach warrants correction under the discretionary component of the plain-error standard. Petitioner's own misconduct rendered the government's promise concerning acceptance-of-responsibility credit valueless to him. Rewarding such a defendant with reversal would produce the very disrepute of judicial proceedings that the plain-error standard is designed to avoid.

ARGUMENT

Because petitioner failed to alert the district court to the government's breach of the plea agreement at sentencing, his claim was subject to the plain-error standard of Federal Rule of Criminal Procedure 52(b). Rule 52(b) "by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case." *Johnson* v. *United States*, 520 U.S. 461, 466 (1997). Under the plain-error standard, petitioner bore the burden of demonstrating that the government's breach affected his substantial rights (*i.e.*, that it was prejudicial), and he did not carry that burden. Even if the breach affected substantial rights, petitioner cannot show that it seriously affected the fairness, integrity, and public reputation of judicial proceedings. To the contrary, rewarding petitioner here with reversal after his own post-plea criminal conduct made the gov-

ernment's agreement that he qualified for acceptance-of-responsibility credit meaningless could call the integrity of judicial proceedings into disrepute. Because the breach was, therefore, not reversible plain error, the judgment should be affirmed.

I. THE PLAIN-ERROR STANDARD OF FEDERAL RULE OF CRIMINAL PROCEDURE 52(b) APPLIES TO FORFEITED PLEA-BREACH CLAIMS

A. Rule 52(b) Applies To All Direct Appeals Of Criminal Cases In The Federal System

1. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)); accord *United States* v. *Cotton*, 535 U.S. 625, 631 (2002); *Peretz* v. *United States*, 501 U.S. 923, 936-937 (1991); *United States* v. *Frady*, 456 U.S. 152, 162-163 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). Rule 52(b)—the plain-error rule—"tempers the blow of a rigid application of the contemporaneous-objection requirement," *United States* v. *Young*, 470 U.S. 1, 15 (1985), by "provid[ing] a court of appeals a limited power to correct errors that were forfeited because not timely raised in the district court," *Olano*, 507 U.S. at 731. Rule 52(b) "reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." *Frady*, 456 U.S. at 163.

Rule 52(b) strikes that "careful balanc[e]" by "grant-[ing] the courts of appeals the latitude to correct particularly egregious errors on appeal regardless of a defendant's trial default." *Frady*, 456 U.S. at 163. "The first limitation on appellate authority under Rule 52(b) is that there indeed be an 'error,'" meaning a "[d]eviation from a legal rule" that has not been waived. *Olano*, 507 U.S. at 732-733. "The second limitation on appellate authority under Rule 52(b) is that the error be 'plain,'" meaning "'clear' or, equivalently, 'obvious.'" *Id.* at 734 (citations omitted). "The third and final limitation on appellate authority under Rule 52(b) is that the plain error 'affec[t] substantial rights,'" which "in most cases * * * means that the error must have been prejudicial [in the sense that it] affected the outcome of the district court proceedings." *Ibid.*; accord *Cotton*, 535 U.S. at 632. When all three requirements are satisfied, "the court of appeals has authority to order correction, but is not required to do so." *Olano*, 507 U.S. at 735. The court must "determine whether the forfeited error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings' before it may exercise its discretion to correct the error." *Johnson*, 520 U.S. at 469-470 (alteration in original; citation omitted). Under the plain-error standard, "the tables are turned" and "the defendant who sat silent at trial has the burden to show [both] that his 'substantial rights' were affected" and that the court of appeals' discretionary authority to correct the error should be exercised. *United States* v. *Vonn*, 535 U.S. 55, 62-63 (2002) (quoting *Olano*, 507 U.S. at 734-735).

2. Rule 52(b) serves important purposes related to the functioning of federal trial and appellate courts. It codifies a longstanding federal practice "founded upon

considerations of fairness to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *United States* v. *Atkinson*, 297 U.S. 157, 159 (1936). The rule promotes finality and judicial efficiency by requiring claims of error to be raised in the trial court—where they can be examined with the benefit of direct participants and fresh recollections and, if necessary, they can be corrected—in order to receive full consideration on appeal. See *Vonn*, 535 U.S. at 73 ("the value of finality requires defense counsel to be on his toes, not just the judge"); *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977) (contemporaneous objection rule "encourages the result that [trial] proceedings be as free of error as possible"). The rule "reduce[s] wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 (2004). And the rule diminishes opportunities and incentives for gamesmanship. It discourages a party from silently acquiescing in error in the trial court and then using that error—"pull[ing] the ace out of his sleeve," *United States* v. *Busche*, 915 F.2d 1150, 1151 (7th Cir. 1990)—to gain reversal on appeal should the trial outcome, or the sentence following a guilty plea, be unsatisfactory. *Vonn*, 535 U.S. at 73; *Luce* v. *United States*, 469 U.S. 38, 42 (1984); *Wainwright*, 433 U.S. at 89.

B. The Policies Of Rule 52(b) Are Served In The Context Of Forfeited Plea-Breach Claims

Rule 52(b) governs a forfeited claim that the government breached a plea agreement just as it governs any other forfeited claim. As the Court has noted, it has "no authority" to "creat[e] out of whole cloth * * * an ex-

ception" to Rule 52(b). *Johnson*, 520 U.S. at 466. And even if that authority existed, a plea-breach exception to plain-error principles would not be warranted.

1. As this Court has recognized, "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice [and,] [p]roperly administered, it is to be encouraged." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971); accord *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). Because a guilty plea "is a grave and solemn act," *Brady* v. *United States*, 397 U.S. 742, 748 (1970), and because a defendant who pleads guilty "simultaneously waives several constitutional rights," *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969), the process of pleading guilty in federal court entails numerous protections designed to ensure that a defendant enters a plea knowingly and voluntarily. Federal Rule of Criminal Procedure 11 vests the district court judge presiding over the plea with direct and personal responsibility for assessing the defendant's understanding of the plea proceeding and the conditions under which he is entering the plea. See, *e.g.*, Fed. R. Crim. P. 11(b)(1) (enumerating 14 topics on which the district court judge must advise the defendant personally in open court and determine that the defendant understands). When a plea agreement is involved, the district court's authority includes responsibility for reviewing and accepting (or rejecting) the agreement. See Fed. R. Crim. P. 11(c). The plea agreement must be disclosed (ordinarily) in open court, and the court must inform the defendant of the court's acceptance or rejection of the agreement and the consequences that follow. Fed. R. Crim. P. 11(a)(2) and (c)(3)-(5). The district court also has authority to *en-*

force a plea agreement, through actual or potential use of its authority under Rule 11(d)(2) to permit a defendant to withdraw from a plea of guilty before sentencing upon a showing of "a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B).

2. a. The integral role of the district court in the guilty-plea process, and in particular its responsibility to review and approve plea agreements, illustrates why the plain-error standard applies fully in the context of plea-breach claims. Contrary to petitioner's assertion that "normally the [district] court does not know the terms of the plea agreement" (Br. 24), the district court *must* know the terms of the plea agreement in order to perform its role under Rule 11.[6] As a result, "an alleged breach of the plea agreement is precisely the type of claim that a district court is best situated to resolve." *United States* v. *Flores-Payon*, 942 F.2d 556, 560 (9th Cir. 1991). The claim is "fact-specific, * * * not generally one which the passage of time may illuminate," and it may "require an evidentiary hearing or proffer of evidence" to resolve. *Ibid.* The district court has the background knowledge to perform those functions, and judicial economy is served by providing the district court with "the first opportunity to rule." *Ibid.*

b. Providing the district court the first opportunity to address an alleged breach of a plea agreement serves interests of finality and efficiency by, in some cases at least, eliminating the need for appellate review altogether. If the district court finds that a plea agreement has been breached, it has a range of measures to remedy

[6] This case is a typical example. The district court had a copy of the filed plea agreement at the plea proceeding, the prosecutor orally summarized the terms of the agreement, and the court reviewed some of the terms in further depth with petitioner and his counsel. J.A. 65a-71a.

the breach or to provide the defendant with alternative relief. For example, if the government agreed in a plea agreement not to file additional charges against a defendant, and then did so, the court can dismiss those charges. Cf. *In re Arnett*, 804 F.2d 1200, 1204 (11th Cir. 1986) (upon finding that the government breached a plea agreement by filing a complaint for forfeiture of the defendant's house and farm, court of appeals permitted the government to cure the breach by withdrawing the forfeiture action). If the government agreed in a plea agreement to request that the defendant be released pending sentencing and then failed to make that request, the court can remind the government of its obligation. Cf. *United States* v. *Pryor*, 957 F.2d 478, 482 (7th Cir. 1992) (observing that alleged government breach of plea agreement, which consisted of the prosecutor's failure to confirm to the court the nature and extent of the defendant's cooperation about which the defendant had testified, "would have been easily cured" if an objection had been made at sentencing). If the government agreed in a plea agreement to relocate the defendant's family out of safety concerns, and then unreasonably delayed in doing so, the court can order the government to fulfill its promise. And if the court decided that the government's breach could *not* be remedied—if, for instance, a family member of the defendant were injured because the government had failed to fulfill a promise to relocate him—the court has the power to permit withdrawal of the defendant's plea under Rule 11(d)(2)(B).

Petitioner contends (Br. 19) that requiring plea-breach claims to be raised in the district court would "do little to further the interest of finality" because "an objection [in the district court] comes too late" to cure a

breach that has already occurred. Petitioner assumes that the only form that a government breach of a plea agreement might take is the narrow form that supports his view, *i.e.*, when the government argues a position at sentencing that is opposite from the position that it agreed to take. Although the breach presented in this case is of that nature, it is not the exclusive form that a breach might take, as the preceding examples illustrate. And the question whether Rule 52(b) applies to plea-breach claims must be assessed with regard to those claims as a category. Cf. *Neder* v. *United States*, 527 U.S. 1, 14 (1999) (whether a constitutional error is "structural" must be assessed as a "categorical" matter rather than through a case-by-case approach).

But even on the facts that petitioner presents—"where the prosecution breaches a promise underlying a guilty plea, and argues *against* a sentence reduction rather than *for* it" (Br. 19)—requiring a contemporaneous objection to the government breach is not so futile as to justify an exception to the plain-error doctrine, even assuming that the Court had authority to carve out an exception. Although petitioner contends that in those circumstances, "the bell cannot be unrung" (*ibid.*), in some cases a retraction by the government of a recommendation that conflicts with its obligation in a plea agreement can remedy the breach. See *United States* v. *Amico*, 416 F.3d 163, 165 (2d Cir. 2005) (government's retraction of its endorsement of sentencing enhancements recommended in PSR cured breach of plea agreement where the government's offending statement was in a "mild, brief, and unassertive form" and the retraction was rapid). "In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris* v. *Rivera*, 454 U.S. 339,

346 (1981) (per curiam). There is no reason to reverse that rule in sentencing proceedings and presume judges cannot disregard a prosecutor's recommendation that should not have been made.

The district court also has alternative means of addressing a government breach in its sentencing recommendation that do not require "unringing" a bell. In *Santobello*, the prosecutor recommended that the maximum one-year sentence be imposed, which violated the government's promise in the plea agreement to make no sentence recommendation. 404 U.S. at 259. The Court remanded the case to the state court to remedy the breach, and it identified two remedial options as specific performance of the plea agreement at a resentencing before a different judge or withdrawal of the plea. *Id.* at 262-263. Those remedies are *equally* available to a district court addressing a plea breach objection before an appeal is taken as they are to the court of appeals. In this case, for instance, if petitioner or his counsel had directed the district court to paragraph 8 of the plea agreement and objected that the government's sentencing recommendation violated that provision, the district court could have transferred the matter to a different judge for sentencing or entertained a motion by the defendant to withdraw his plea under Rule 11(d)(2)(B). And an appeal may not have been required at all on the plea-breach issue. As with any other error that can occur in a criminal case resolved through a guilty plea, requiring a contemporaneous objection to an alleged government breach of a plea agreement "concentrates plea litigation in the trial courts, where genuine mistakes can be corrected easily, and promotes the finality required in a system as heavily dependent on guilty pleas as ours." *Vonn*, 535 U.S. at 72.

c. Exempting plea-breach claims from the rigors of the plain-error standard would raise the same concerns about distorted incentives that were present in *Vonn*. In *Vonn*, the Court held that the omission of a plain-error counterpart to the harmless-error rule contained in Rule 11(h) did not mean that forfeited Rule 11 errors were excepted from the plain-error standard of Rule 52(b). 535 U.S. at 58-59. Among other considerations, the Court emphasized that if Rule 52(b) were held not to apply to Rule 11 error, "a defendant could choose to say nothing about a judge's plain lapse under Rule 11." *Id.* at 73. The defendant could "simply relax and wait to see if the sentence later struck him as satisfactory; if not, his Rule 11 silence would have left him with clear but uncorrected Rule 11 error to place on the Government's shoulders." *Ibid.* The same result would follow from petitioner's proposal that anytime the government breached a plea agreement, a reviewing court must, despite the defendant's forfeiture, automatically reverse in order to permit the defendant to choose "whether to plead guilty under the new conditions and circumstances created by the prosecutor's breach" (Br. 29). Petitioner's rule would create strategic incentives for defendants to withhold objections to government breaches generally, and to *curable* government breaches particularly, because on appeal any breach would guarantee the defendant a second chance to consider whether to plead guilty or not. And that second look would afford the defendant the strategic benefit of perfect hindsight as to the sentence that was imposed the first time around. See *In re Sealed Case*, 356 F.3d 313, 319 (D.C. Cir.) (applying plain-error standard to forfeited plea-breach claims when the defendant had "the opportunity and knowledge to object" in the district court "is totally con-

sistent with the anti-sandbagging philosophy of the Federal Rules"), cert. denied, 543 U.S. 885 (2004).

Relatedly, and as the Court also explained in *Vonn*, freeing forfeited plea-breach claims from the plain-error rule would undercut Rule 11(e), "which governs withdrawing a plea of guilty by creating an incentive to file withdrawal motions before sentencing, not afterward." *Vonn*, 535 U.S. at 72.[7] Rule 11(e) provides that a defendant "may not withdraw a plea of guilty" after sentence is imposed and that, after sentencing, the "plea may be set aside only on direct appeal or collateral attack." Fed. R. Crim. P. 11(e). Rule 11(d), on the other hand, permits a defendant to withdraw a guilty plea before sentencing for "a fair and just reason." Fed. R. Crim. P. 11(d)(2)(B). A rule requiring automatic reversal on direct appeal of forfeited plea-breach claims would collapse the distinction in Rule 11 between pre- and post-sentence plea-withdrawal motions when the basis for the motion is an alleged government breach of the plea agreement. Under petitioner's rule, a defendant could set aside his plea on direct appeal based on a breach as readily as he could through a pre-sentence motion under Rule 11(d)(2)(B). As a result, "the incentive to think and act early * * * would prove less substantial." *Vonn*, 535 U.S. at 73.

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[7] At the time *Vonn* was decided, the federal rule governing the withdrawal of guilty pleas was Rule 32(e). *Vonn*, 535 U.S. at 72. In 2002, the rule was renumbered as Rule 11(e). See Fed. R. Crim. P. 32 advisory committee's note (2002) (Amendment).

II. PETITIONER'S ARGUMENTS FOR EXEMPTING PLEA-BREACH CLAIMS FROM RULE 52(b) ARE WITHOUT MERIT

Petitioner asserts that a government breach of a plea agreement "changes the conditions under which a guilty plea is entered [and] *compels* reversal of the conviction, as a matter of due process, unless the defendant knowingly and personally accepts the new conditions" (Br. 3). Petitioner further asserts (Br. 17-20) that this rule of automatic reversal applies regardless of whether defense counsel objected to the breach of the plea agreement in the trial court because "[i]f defense counsel cannot expressly waive a defendant's trial rights, counsel certainly cannot forfeit them by silence" (Br. 18). Petitioner also contends that Rule 52(b) "by its terms" (Br. 21) does not apply to plea-breach claims and could do "no substantive work" (Br. 22) if it were applied to plea-breach claims. Those arguments are without merit.

A. A Deviation By The Government From The Terms Of A Plea Agreement Does Not Necessarily Vitiate The Voluntariness Of The Guilty Plea

A central premise of petitioner's argument is that any deviation by the government from the terms of a plea agreement "*necessarily* vitiates the voluntariness of the guilty plea" and thereby "inherently prejudices" the defendant's fundamental rights. Br. 13. That rule would lead to untenable results. For example, suppose that two defendants, *A* and *B*, both pleaded guilty to bank robbery pursuant to plea agreements that included promises by the government that it would ask the district court at sentencing not to require the defendant to pay restitution. And suppose the prosecutor neglected to make that request. The defense attorneys failed to

object, so the government's breach went uncorrected. At sentencing, the district court required *A* to pay restitution but did not require *B* to pay restitution. According to petitioner, the government's breach retroactively rendered both defendants' guilty pleas involuntary and, on appeal, both defendants would be entitled to automatic reversal of their convictions in order to decide whether they will plead guilty "under the new conditions and circumstances created by the prosecutor's breach" (Br. 29). Petitioner's argument has "unqualified simplicity," *Vonn*, 535 U.S. at 63, but it is incorrect.[8]

"A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" *Bradshaw* v. *Stumpf*, 545 U.S. 175, 183 (2005) (quoting *Bra-*

[8] At two places in his brief, petitioner suggests that a "materiality" standard plays some role in assessing whether a forfeited claim that the government breached a plea agreement requires automatic reversal. See Br. 25 n.6 (referring to breach of a "material" term of the agreement), 30 (observing that plain-error standard is "necessarily satisfied for any material breach of a plea agreement's terms"). To the extent that petitioner concedes that some government breaches of plea agreements will not require a guilty plea to be set aside, that concession contradicts petitioner's principal assertion that an alteration in "the conditions under which the defendant elected to waive his trial rights * * * render[s] the waiver involuntary by definition." Br. 9; Cf., *e.g.*, *United States* v. *Brody*, 808 F.2d 944, 948 (2d Cir. 1986) (a government breach of a plea agreement does not automatically require resentencing; whether a remedy is required will depend on the nature of the broken promise and the facts of the case). Petitioner's apparent concession that some government breaches are not "material" enough to warrant relief also amounts to acknowledgment that harmless-error principles, and by extension plain-error principles, *can* be applied to plea-breach claims. If those principles *can* be applied, Rule 52 dictates that they *must* be applied.

dy, 397 U.S. at 748). "[O]nly when it develops that the defendant was not fairly apprised of its consequences can his plea be challenged under the Due Process Clause." *Mabry* v. *Johnson*, 467 U.S. 504, 509 (1984). That due process standard provides the framework for understanding this Court's statement that the "voluntariness" of a guilty plea is assessed in part by whether "unfulfilled or unfulfillable promises" induced the plea. *Brady*, 397 U.S. at 755; see *Santobello*, 404 U.S. at 261 (if a promise is part of the inducement or consideration of a guilty plea, it must be fulfilled). While the government, just like the defendant, should of course fulfill all its promises in a plea agreement, not every government deviation from the terms of a plea agreement will mean that the defendant was not fairly apprised of the consequences of his plea such that the plea should be retroactively deemed to be involuntary. In the predominant factual setting in which claims of a plea breach by the government arise—alleged breaches of government promises to take a particular position at sentencing—the circumstances may compel the conclusion that, notwithstanding a government breach, the defendant received the benefit for which he bargained and, accordingly, the defendant must be said to have been "fairly apprised" of the consequences of his plea.

In the case of defendants *A* and *B* described above, for instance, the "consequence" that the government's promise secured was a *chance* that the sentencing court would be influenced by and follow the government's recommendation that restitution not be required. The actual value to the defendants of that promise cannot be known at the time the plea agreement is entered, because its calculation requires a prediction about whether the sentencing court will be influenced by the govern-

ment's recommendation or not.[9] Defendant *A* was deprived of the benefit for which he bargained, because he did not receive the enhanced *chance* at avoiding restitution that was part of his deal. If his objection were properly preserved, he would be entitled to a remedy. See *Santobello*, 404 U.S. at 262-263.

In the case of defendant *B*, however, the defendant was not deprived of the benefit for which he bargained, and the government's breach therefore cannot be said to have rendered the guilty plea "involuntary" in any way that warrants relieving him from the plea. Defendant *B* bargained for an enhanced *chance* for leniency with respect to restitution—and, by virtue of the district court's sentence, he received even more, *i.e.*, *actual* leniency. In those circumstances, due process requires no remedy for the prosecutor's breach. See, *e.g.*, *United States* v. *Vaval*, 404 F.3d 144, 154 (2d Cir. 2005) ("[N]ot every breach requires a remedy; the need for a remedy depends upon the 'nature of the broken promise and the facts of each particular case.'") (quoting *United States* v. *Brody*, 808 F.2d 944, 948 (2d Cir. 1986)); *Paradiso* v. *United States*, 689 F.2d 28, 30-31 (2d Cir. 1982) (where plea agreement bound court to impose concurrent sentences and court initially imposed consecutive sentences, but where court then modified sentences upon defendant's motion under Rule 35, "the technical divergence from the precise terms of the plea agreement" did not require a remedy and "did not render appellant's plea involuntary by frustrating his reasonable expectations

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[9] One exception is a plea agreement entered pursuant to Rule 11(c)(1)(C) which, if accepted by the court, binds the court to abide by the sentencing terms made part of the agreement. See Fed. R. Crim. P. 11(c)(1)(C) and (4).

with regard to sentence"), cert. denied, 459 U.S. 1116 (1983).

Petitioner's theory that a government breach "*necessarily* vitiates the voluntariness of the guilty plea" and requires that his plea be set aside (Br. 13) also assumes that the value to the defendant of a government promise cannot change after the plea is entered. On the facts of this case, for instance, petitioner asserts that the voluntariness of his guilty plea was vitiated by the government's breach because, "if the Government had not promised to seek a three-level reduction, he never would have entered the plea agreement." Br. 26. The government's promise regarding acceptance-of-responsibility credit may have been important to petitioner at the time he entered his guilty plea. But the extent to which the government's breach actually harmed petitioner's reasonable expectations about the benefits he would receive under the plea agreement must be assessed no earlier than when the *breach* occurred. It cannot realistically be assessed as of the time the plea was entered.

To illustrate, suppose that after his guilty plea, petitioner had obstructed justice by offering the Guaranty Bank tellers cash if they would recant their identifications of him, a turn of events that might have supported a motion to withdraw petitioner's guilty plea. If the scheme were discovered, petitioner might have become subject to application note 4 of the acceptance-of-responsibility Sentencing Guideline, which provides that obstruction of justice "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct." Sentencing Guidelines § 3E1.1, comment. (n.4). That note also provides that only in an "extraordinary case" should acceptance-of-responsibility credit be awarded to a defendant who has obstructed justice.

Ibid. Judged at the time of the plea, the government's promise to support petitioner's request for acceptance-of-responsibility credit may have had significant value to him. But at the time of sentencing, when acceptance-of-responsibility credit was all but foreclosed by the Sentencing Guidelines, that promise would have lost most, if not all, of its value. Assessing the harm caused by a government breach of a plea agreement by reference to the value of the government's promise at the time a guilty plea was entered is equivalent to assessing the current value of a company's stock by reference to last year's trading price.

B. The Contemporaneous Objection Requirement Applies Equally When A Waiver Of Trial Rights Is At Issue

A second premise of petitioner's argument (Br. 17-20) is that applying the plain-error standard to forfeited plea-breach claims is equivalent to permitting counsel to waive a defendant's right to trial. Petitioner contends that "if defense counsel cannot expressly waive a defendant's trial rights, counsel certainly cannot forfeit them by silence." Br. 18. There is a difference, however, between permitting counsel to "expressly waive" a defendant's trial rights and requiring counsel to object to errors in proceedings in which the *defendant* "expressly waives" his trial rights, or in subsequent proceedings that relate back to that waiver. The Court's precedents make clear that Rule 52(b)'s strictures for reviewing forfeited claims apply with full force to a claim that a defendant's waiver of a constitutional or statutory right was invalid.

In *Johnson*, this Court rejected the argument that the plain-error rule was inapplicable because the error asserted was "structural." 520 U.S. at 466. The Court

explained that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Ibid.* The Court subsequently held that Rule 52(b) applies even when the nature of the claimed error is that the defendant did not make an informed waiver of his trial rights. In *Vonn*, the Court reviewed for plain error under Rule 52(b) a claim that a defendant did not adequately waive his rights in pleading guilty because the trial court failed to advise him of his right to counsel at trial as required by Rule 11. The Court explained that "counsel is obligated to understand the Rule 11 requirements" and that "[i]t is fair to burden the defendant with his lawyer's obligation to do what is reasonably necessary to render the guilty plea effectual and to refrain from trifling with the court." *Vonn*, 535 U.S. at 73 n.10; accord *Dominguez-Benitez*, 542 U.S. at 82 (applying plain-error standard to forfeited claim of Rule 11 error and holding that defendant bears burden under that standard of showing, among other things, a reasonable probability that, but for the error, he would not have entered the plea).

Petitioner's reliance (Br. 17-18) on *Henderson* v. *Morgan*, 426 U.S. 637 (1976), is misplaced. *Henderson* involved a collateral attack on a guilty plea on the ground that the defendant was not informed of, and did not understand, an essential element of the offense to which he had pleaded guilty, second-degree murder. *Id.* at 638-639. The defendant had not filed a direct appeal following his guilty plea. *Id.* at 638. Without addressing whether procedural-default principles should apply, the Court upheld the lower courts' holdings that the defendant's plea "was involuntary and had to be set aside," *id.* at 640, because the record failed to show that the defen-

dant understood, and admitted to having, the requisite intent, *id.* at 646.

Petitioner contends that *Henderson* demonstrates that a lack of objection in the trial court to an allegedly involuntary plea does "not diminish the violation or restrict the standard of review." Br. 17. But *Henderson* is silent on the standard of review. And subsequently in *Bousley* v. *United States*, 523 U.S. 614 (1998), the Court made clear that procedural-default principles apply with equal force to claims that involve allegedly involuntary guilty pleas: "[E]ven the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Id.* at 621. The defendant in *Bousley* claimed in a collateral attack that his guilty plea was not knowing and intelligent because he had been misinformed about the elements of the offense to which he pleaded guilty. *Id.* at 617-618. As in *Henderson*, the defendant in *Bousley* had not challenged the validity of his plea on direct appeal. *Id.* at 617. The Court held in *Bousley* that the defendant's claim could be considered on the merits only if he overcame "significant procedural hurdles," *id.* at 621, namely, he was required to demonstrate cause for and actual prejudice from his procedural default, or actual innocence, *id.* at 622 (citing, *e.g.*, *Murray* v. *Carrier*, 477 U.S. 478 (1986)).

C. There Is No Functional Impediment To Applying The Plain-Error Standard To Plea-Breach Claims

Petitioner asserts that Rule 52(b) "cannot be meaningfully applied to review of a prosecutor's breach of a plea agreement." Br. 24. Relying on *Nguyen* v. *United States*, 539 U.S. 69 (2003), petitioner contends that plea-breach claims therefore are in a category of errors that are "not susceptible to plain-error review under Rule

52(b)." Br. 21. That is incorrect. In this context, as in most settings, the claimed error can be examined to determine whether it had an effect on "substantial rights" and, absent such a showing, reversal is not warranted.

1. *Nguyen* bears no resemblance to this case. *Nguyen* involved the composition of a panel of the United States Court of Appeals for the Ninth Circuit. 539 U.S. at 71. In violation of the federal statute permitting "one or more district judges within the circuit" to sit on the court of appeals, see 28 U.S.C. 292(a), the Ninth Circuit panel included a judge from the District Court for the Northern Mariana Islands, a non-Article III court, who did not qualify as a "district judge" within the meaning of 28 U.S.C. 292(a). *Nguyen*, 539 U.S. at 74-75. Although no objection to the composition of the panel was raised in the Ninth Circuit, the Court concluded that the judgment was required to be vacated without regard to plain-error principles. *Id.* at 80-81. The Court justified that departure from ordinary principles of appellate review by emphasizing the unique nature of the error at issue and its connection to policies of judicial administration over which the Court has supervisory power: "Because the error in these cases involves a violation of a statutory provision that 'embodies a strong policy concerning the proper administration of judicial business,' * * * our exercise of supervisory power is not inconsistent with th[e] general rule" that federal courts must "assess trial errors for their prejudicial effect." *Id.* at 81 (citation omitted). Unlike *Nguyen*, this case does not involve policies concerning "the proper administration of judicial business." It involves trial error. The "general rule," reaffirmed in *Nguyen*, therefore applies: "[F]ederal courts may not use their supervisory powers to circumvent the obliga-

tion to assess trial errors for their prejudicial effect." *Ibid.* (citing *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988)).

2. Petitioner's arguments for why Rule 52(b) "cannot meaningfully be applied" to plea-breach claims (Br. 24) also lack merit. Petitioner contends that a breach of the plea agreement "can never be 'plain' to the court" (*ibid.*) because the district court "normally" would not know the terms of the agreement. But as discussed (see pp. 19-20, *supra*), and as illustrated by the facts of this case, petitioner is wrong. District courts *do* know the terms of plea agreements because they must review and approve those agreements. And in any event, the defense attorney and the defendant surely know the terms of the agreement because they are signatories to it. There is no more reason to excuse a failure to object to obvious error in this context than in any other.

Petitioner also contends (Br. 25-28) that "substantial rights" will always be affected when a plea agreement has been breached. That too is incorrect. This Court has instructed that an effect on substantial rights under the plain-error rule ordinarily means that the error "must have been prejudicial," which in turn means that it "must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. An error will be found to have had no effect on a defendant's substantial rights, therefore, if the outcome of the proceeding "would have been the same" if the error had not occurred. *Jones* v. *United States*, 527 U.S. 373, 402 (1999); *Neder*, 527 U.S. at 17.

Where, as in this case, the government breach involves a prosecutor's failure to make or abstain from particular comments at sentencing, a defendant will carry his burden of showing an effect on substantial

rights only if he can demonstrate that the prosecutor's breach detrimentally affected the sentence that was imposed. The benefit a defendant receives from the prosecutor's agreement is the potential influence that the prosecutor will have *on the defendant's sentence*. The question whether the prosecutor's breach of the agreement prejudiced the defendant must focus on the proceeding that was affected by the error—in this case, sentencing. See, *e.g.*, *United States* v. *Flores-Sandoval*, 94 F.3d 346, 351-352 (7th Cir. 1996) (government's failure to advise sentencing court of its recommendation that the court impose sentence at the low end of the Guidelines range did not affect substantial rights where court's comments revealed that it was aware of the government's recommendation, which was contained in the plea agreement); *United States* v. *D'Iguillont*, 979 F.2d 612, 613-614 (7th Cir. 1992) (government argument in favor of upward departure did not affect substantial rights where court sentenced defendant within the Guidelines range), cert. denied, 507 U.S. 1040 (1993).

This approach is consistent with *Hill* v. *Lockhart*, 474 U.S. 52 (1985), and *Dominguez-Benitez*, *supra*, on which petitioner relies (Br. 27-28). In *Hill*, the Court held that a defendant who claims that his lawyer provided ineffective assistance in the advice he provided in connection with a guilty plea satisfies the "prejudice" requirement of *Strickland* v. *Washington*, 466 U.S. 668 (1984), by showing that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 58-59. In *Dominguez-Benitez*, the Court held that a defendant who raises a forfeited Rule 11 error on direct appeal satisfies the "effect on substantial rights" component of the plain-error standard by

showing "a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. at 83. In both of those cases, the error related to the process through which the guilty plea itself was entered. In assessing prejudice in that context, it is appropriate to focus on the proceeding affected by the error—the plea proceeding—and examine whether error in the process led the defendant to enter a guilty plea that he otherwise would have foregone. By contrast, when the error complained of relates to the *execution* of a plea agreement, the assessment of prejudice must focus on whether the outcome of the proceeding in which the breach occurred was affected by the error. When the breach occurs at sentencing, the "effect on substantial rights" inquiry therefore examines the sentencing itself. See *United States* v. *Jensen*, 423 F.3d 851, 854 (8th Cir. 2005) (government breach of agreement to make motion that defendant receive third level of credit for acceptance of responsibility was not reversible plain error where defendant did not demonstrate a reasonable probability that district court would have imposed a lesser sentence if the government had moved for the additional level); cf. *Williams* v. *United States*, 503 U.S. 193, 203 (1992) (sentencing error is not prejudicial if "the error did not affect the district court's selection of the sentence").

3. *Santobello* is not to the contrary. In that case, which arose out of state court, the prosecutor recommended to the sentencing court that the defendant receive a one-year sentence and supported the recommendation with remarks concerning the defendant's criminal history and links with organized crime. 404 U.S. at 259. A different prosecutor had agreed to make no recommendation on sentence. *Id.* at 258. The defense attor-

ney, who was new to the case at sentencing, objected to the breach and offered to prove up the terms of the agreement. *Id.* at 259. The prosecutor resisted, asserting that the record did not reveal any promise concerning sentencing. *Ibid.* The judge, who also was new to the case at sentencing, "ended discussion," *ibid.*, indicated he was "not at all influenced" by the prosecutor's remarks, and imposed a one-year sentence, *id.* at 259-260. This Court reversed without reaching the question "whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea." *Id.* at 262. The Court concluded "that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration" concerning the remedy to which the defendant was entitled. *Id.* at 262-263.

Santobello involved a situation in which, on top of the obvious government breach of the plea agreement that occurred, the government opposed the defense's request to present proof of the plea agreement, the sentencing court disavowed interest in knowing anything about the terms of the plea agreement, and the sentencing court imposed the precise sentence that the prosecutor improperly requested. The fact that the Court declined to consider whether the multiple errors in *Santobello* were harmless says nothing about whether and how the plain-error standard should be applied in federal cases, subject to Rule 52(b), where (as here) the terms of the plea agreement are known to the courtroom participants, and where no one alerts the district court to an obvious breach as it occurs. See *Amico*, 416 F.3d at 168 n.3 (*Santobello* "did not state a *per se* rule requiring re-

sentencing in any case of prosecutorial breach of a plea agreement regardless of the extent of breach and absence of prejudice); *In re Sealed Case*, 356 F.3d at 316 (*Santobello* "[i]n no way" dictates the standard of review in a case of forfeited error). The Court's statement in *Santobello* that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled," *Santobello*, 404 U.S. at 262, reflects a legal norm in this area but is not inconsistent with the conclusion, compelled by the Court's decisions under Rule 52(b), that when a defendant fails to object to a government breach in the district court, he will face a more formidable burden to demonstrate his entitlement to relief on appeal. That burden must include a showing that the government's breach had an effect on substantial rights, *i.e.*, it caused actual prejudice to the defendant in the outcome of the proceeding.

D. A Plea-Breach Claim Raised For The First Time On Appeal May Be Barred By The Discretionary Component Of Plain-Error Review

Relying on *Santobello*, petitioner contends that the fourth requirement of plain-error review is "easily satisfied by the prosecution's breach of any plea agreement," Br. 29, because a government breach "undermines 'public confidence in the fair administration of justice,'" Br. 28. See NACDL Amic. Br. 21-22. Even on the assumption that a plain government breach of a plea agreement necessarily affects a defendant's substantial rights by altering the terms on which he waived his trial rights, the discretionary component of the plain-error rule should preclude reversal if that breach did not adversely

affect the defendant's sentence. As the Court observed in *Johnson*, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." 520 U.S. at 470 (quoting Roger Traynor, *The Riddle of Harmless Error* 50 (1970)). A rule that would allow a defendant to refrain from raising an obvious government breach of a plea agreement in the district court, and then, after sentence and entry of judgment, use that breach to escape his plea even if the breach did not affect the sentence the defendant received, would convert guilty plea proceedings into a strategic battle to have one's cake and eat it too. That regime would elevate inconsequential errors over substantial justice.

Particularly in the guilty plea process, where this Court has declined to "degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess," *United States* v. *Hyde*, 520 U.S. 670, 677 (1997), reviewing courts should be wary of allowing defendants to seize on any forfeited errors to overturn their convictions. A defendant's failure to object to a government breach may be evidence that the participants at the time did not regard it as particularly consequential. A reviewing court can certainly take that reality into account before upsetting an otherwise-final conviction. Reversal in this context allows a defendant the option, often years after the fact, of putting the government to its proof and reopening the matter for victims and witnesses. Where the defendant cannot show that the government's fulfillment of its promises likely would have changed the outcome, allowing the plea-based conviction to stand *protects* the integrity and public reputation of the proceedings.

III. THE GOVERNMENT'S BREACH OF THE PLEA AGREEMENT IN THIS CASE WAS NOT REVERSIBLE PLAIN ERROR

The government has conceded that, by opposing a downward adjustment in petitioner's offense level for acceptance of responsibility, it breached the agreement it made with petitioner that he had demonstrated acceptance of responsibility. Unlike the government's motion in support of a third level of acceptance-of-responsibility credit, the plea agreement contained no provision that explicitly permitted the government to withdraw its commitment if petitioner engaged in subsequent criminal conduct that undermined his showing of acceptance. See Sentencing Guidelines § 3E1.1, comment. (n.1(b)). The agreement also contained no explicit provision that required petitioner to abstain from criminal conduct. Under the explicit terms of the agreement (and the government has not asserted in these proceedings that the agreement contained additional implicit terms), the government's breach was obvious. But the court of appeals correctly determined that petitioner is not entitled to relief because he cannot establish that the government's breach was reversible plain error. Petitioner cannot show that his substantial rights were affected by the government's breach. See *Olano*, 507 U.S. at 734. Nor can petitioner show that discretionary correction of the forfeited error is warranted because the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (quoting *Atkinson*, 297 U.S. at 160).

A. Petitioner Cannot Demonstrate That The Government's Breach Of The Plea Agreement Affected His Substantial Rights

As the court of appeals determined, the record demonstrates that petitioner's substantial rights were not affected by the government's breach because the district court made clear that, in the circumstances that existed at the time of sentencing—which included the defendant's admission that he had engaged in new criminal conduct while he was awaiting sentencing—the court would not award petitioner credit for acceptance of responsibility. See J.A. 80a-81a, 111a. The only value to petitioner of the government's agreement that he qualified for acceptance-of-responsibility credit was the influence that the government's view *might* have had on the district court. Through his own intervening criminal conduct, however, petitioner put acceptance-of-responsibility credit outside his own reach and, in doing so, fundamentally devalued the government's promise to the point that, at the time of sentencing, it had no value. As the court of appeals concluded, even if the government had maintained its position that petitioner qualified for an acceptance-of-responsibility adjustment, there is no likelihood that the government would have influenced the district court's sentencing decision given petitioner's intervening criminal conduct. Pet. App. 1, at 5. Petitioner therefore cannot carry his burden of demonstrating that his substantial rights were affected by the government's breach.

B. Petitioner Cannot Demonstrate That The Government's Breach Of The Plea Agreement Seriously Affected The Fairness, Integrity, Or Public Reputation Of Judicial Proceedings

Even if one were to accept petitioner's view that substantial rights are always affected when the government breaches a plea agreement, petitioner cannot demonstrate that the government's breach warrants correction by the court of appeals because the breach did not, in the context of this case, "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (quoting *Atkinson*, 297 U.S. at 160). It was undisputed in the district court that petitioner committed a new crime before he was sentenced. Continued criminal conduct is the antithesis of acceptance of responsibility. Although the government failed to fulfill the unconditional promise it made (before petitioner's renewed criminal conduct) to support petitioner's request for an acceptance-of-responsibility adjustment, the reciprocal assurance on which the government's promise implicitly was based was that petitioner would not return to criminality before he was sentenced. Petitioner's own conduct ensured that, regardless of what the government said, no reasonable probability existed that the court would be influenced.

The discretionary component of the plain-error rule should preclude reversal if a defendant engages in post-plea misconduct that renders the government's sentencing promise an absurdity. In that situation, there is no basis to conclude that a "miscarriage of justice" or any other impairment of the integrity of judicial proceedings would result, *Olano*, 507 U.S. at 736 (quoting *Young*, 470 U.S. at 15), if the defendant were not allowed to withdraw his guilty plea. Cf. *Cotton*, 535 U.S. at 633 (omis-

sion of drug quantity from indictment did not seriously affect fairness, integrity, or public reputation of judicial proceedings where evidence supporting drug quantity was overwhelming and essentially uncontroverted); *United States* v. *Branam*, 231 F.3d 931, 933 (5th Cir. 2000) (assuming prosecutor's comment at sentencing breached plea agreement and satisfied first three requirements of plain-error standard, relief was not warranted under fourth requirement of plain-error review because defendant failed to comply with plea agreement's reasonable and specific procedures for determining whether a breach had occurred and for affording the breaching party a reasonable opportunity to explain or cure the breach). Indeed, just the opposite is true when it comes to protecting the integrity of judicial proceedings. Rewarding a defendant with reversal after the defendant not only made the government's commitment meaningless through his own criminal conduct, but also stood by silently at sentencing, would instead produce the very disrepute of judicial proceedings that the plain-error rule is designed to avoid.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LISA H. SCHERTLER
Assistant to the Solicitor General
KATHLEEN A. FELTON
Attorney

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APPENDIX

1. Federal Rule of Criminal Procedure 11 provides:

Pleas

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no

right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

2. Federal Rule of Criminal Procedure 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.